No. 4949.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Luigi Sagliuzzo, et al.,
Libellants and Appellants,
vs.
Gasoline Launch "I. S. E. #2."
Respondent,
J. E. Frymier,
Respondent and Claimant.

Claimant and Respondent's Petition for Rehearing.

WILBUR BASSETT,
Proctor for Claimant and Respondent.

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To the Honorable Circuit Judges of the United States Circuit Court of Appeals for the Ninth District:

The undersigned, your petitioner, respectfully submits that he has been aggrieved by an opinion of Your Honors rendered herein on November 1, 1926, in respects hereinafter set forth, and prays for a rehearing of said matter.

FACTS.

This is an admiralty appeal from a decree finding that libellants had abandoned their cause and were in contumacy and default and dismissing their amended libel.

One Mascola alleged in the libel that he had a contract of employment for one-sixth of the "proceeds" of a fishing voyage. Five others joined as libellants alleged that they had a contract with him to pay them each one-sixth of the "net proceeds." Exceptions to the libel were sustained, and to an amended libel fifteen exceptions were sustained, with ten days' leave to amend. No amendment being made, the cause was dismissed.

Any Error in Ruling on Exceptions Was Waived by Taking Leave to Amend.

We respectfully invite the court's attention to the statement in the opinion, (page 4):

> "Nor was the right of appeal waived by the order granting leave to amend. Woodward v. McConnaughey, 106 Fed. 758."

We suggest that this case is not only not authority on this point, but that it holds directly the contrary. The court said: "It was not dismissed for want of prosecution as in the Washington decisions cited by the appellee." These Washington decisions are Pacific Supply Company v. Brand, 35 Pac. 72, and Hall v. Skavdale, 57 Pac. 807. In the former case, upon sustaining a demurrer plaintiff had been given ten days to amend, and no amendment being made, there was a judgment of default and dismissal and the court said:

> "Appellant contends that it did not desire to amend the pleading, that the sustaining of the demurrer and the dismissal was in effect an adjudication of its rights upon the merits, and that it was its intention to appeal therefrom to test the validity thereof in this court. However this may be, the

> status of the case here must depend upon the record as made in the lower court, and there is nothing on the face of the record to indicate appellant's contention in anywise, except the bare fact that an appeal was taken, as stated. An appeal will not lie directly from a judgment of dismissal for want of prosecution, and it must be dismissed."

In Hall v. Skavdale, the facts were exactly the same, that is, leave was given to amend after demurrer sustained, and no amendment being offered within the time limited, the action was dismissed.

It thus appears that both of these Washington cases were exactly the situation at bar and that in Woodward v. McConnaughey, relied upon in the opinion at bar, the court expressly based its decision upon the fact that the cause "was not dismissed for want of prosecution, as in the Washington decisions." We submit that the error was waived under the authority of Berry v. Barton, quoted on page 7 of our brief.

The Finding of Abandonment and Contumacy Not Being Attacked, the Appellant Is in Contumacy and Default in This Court.

In the case at bar the trial court, under the authority of Supreme Court Rule No. 38, has found that the libellants had abandoned their case and were in contumacy and default. Appellants find no fault with this judgment, nor have they sought in the court below to be relieved of the effects of their default, as they might well have been upon application to that court in due time. We think it clear that the litigant who is found to be in default in the trial court and has an adequate remedy in

that court to be relieved from the default, is just as much in default in the upper court as he was in the court below. We are aware of the force of section 269 of the Judicial Code, but we suggest that this is merely a relieving statute and does not dispense with the rules of pleading or even those of procedure, thus Wild v. United States, 291 Fed. 334: Improper cross-examination not objected to is no ground for a new trial. And in Robilio v. United States, 291 Fed. 975; Pope v. United States, 289 Fed. 312; Landsberg v. San Francisco & P. S. S. Co., 288 Fed. 560; and Bilboa v. United States, 287 Fed. 125, it was held that this section does not dispense with the necessity of objection or exception below.

Should not Your Honors upon this appeal give effect to the finding of the trial court that "the cause is deserted" and that libellants have not "complied with the orders of the court"? Your Honors say that this is a trial *de novo,* but we think it is merely a writ of error. "A present day appeal is not a new trial and hence is not an admiralty appeal, in the older sense of that term, but rather resembles a writ of error at common law." Benedict, Sec. 566. Your Honors have held that even where the facts came up, the findings of the District Court on conflicting evidence could not be disturbed unless contrary to the evidence. Alaska Packers Association v. Dominico, 117 Fed. 99; Paauhau v. Pala Pala, 127 Fed. 920. It is evident, therefore, that Your Honors view an appeal in admiralty, even from a judgment on the merits, as a writ of error. Certainly there can be no error in an interlocutory order if the final decree shows that the cause is deserted and that appellant had leave to amend and finds no fault with the final decree.

The Court Has Misconstrued the Attitude of the Trial Court in Sustaining Exceptions.

Your Honors' opinion is based upon the conclusion that the trial court considered the lack of an accounting fatal, and we find no comment upon any other of the exceptions. Your Honors say that proctors for appellant say the trial court decided that a court of admiralty had no jurisdiction over a suit for accounting and that we did not deny it. We could not deny it, for the reason that the court, by sustaining the exceptions, so held as to the amended libel but it is not a fact nor is it averred as a fact by appellants, that the court made any statement of this character. On the contrary, as we recall it, the court merely said, as the record recites, "Exceptions sustained." It is important, however, that we call Your Honors' attention to the fact that Judge McCormick overruled the Exception No. IV to the original libel upon this ground. (App. p. 12.) We respectfully suggest that the statement of counsel, "The court below decided," was a fairly proper deduction of counsel from the decision, and we therefore could not deny it, but Your Honors have been misled in thinking that either side intended this to be a statement of any reasons actually given from the bench, for such was not the case. The writer of appellants' brief was not present nor of counsel at that time.

If Your Honors assume that this cause was dismissed for lack of jurisdiction, we suggest that such is not the case. Judge McCormick refused to sustain this objection on Exception No. IV to the original libel. We take it that his reason for sustaining it to the amended libel was that Mascola, one of the libellants, alleged that he had

the entire proceeds in his hands. There was no allegation that they had demanded an accounting of him, or that he tendered an accounting to claimant.

Whatever Be the Rule as to Jurisdiction to Give an Accounting, the Trial Court Properly Sustained the Exception for Uncertainty.

We are at a loss to understand upon what theory exceptions for uncertainty "call for no special consideration." Rule 27 in admiralty of the Supreme Court distinctly provides for such proceeding, and indicates that upon an order sustaining exceptions parties shall be *required* to plead, and if they do not, a finding shall be made that the cause is deserted and that the party is in default and contumacy. (Rule 38.) The appellant here admits that he has deserted his cause by not attacking the judgment and finding to that effect. Leave to amend in admiralty is an order to amend under Rule 27 and can not be disobeyed without contumacy.

Passing now to the matter of accounting, we note the citation of The Larch, 14 Fed. Cas. 8086, leaving the matter "to the sound discretion of the court, whether it will take cognizance of the account or not." How can Your Honors say that Judge McCormick erred in requiring libellants to amend so as to set out their contract (Exceptions II and VI) and thus enable him to determine whether that contract provided for a complicated accounting or not? Your Honors considered only the time element, but time is only one factor and no other factor is disclosed by the libel. There is not the least suggestion of how the net proceeds are to be computed. Your Honors apparently proceeded upon the theory that

the libel stated a cause of action because it would support a *quantum meruit,* but this apparently is not the law. The Ianthe, 12 Fed. Cas. 6992. "This Act does not contemplate or provide for the case of a fisherman shipped without a written agreement and, by not providing for it, leaves the rights of the parties to be determined by the principles of law governing other parole contracts, that is, leaves them just such rights as were secured by their agreement, and gives them no others." Please note that the claimant was not a party to this contract, nor is it even alleged to have been made in his behalf, [Ex. V], nor the contents or effects of it, or even whether it was in writing or oral [Ex. IV], or whether it was a personal agreement of Mascola, or made on the credit of the ship.

We suggest The Larch, The Carrier Dove, and The Hunter are all trial court cases in which the matter of deductions and allowances from gross proceeds were properly pleaded, thus in The Carrier Dove, wharfage and scalage. The opinion at bar says, "This decision accords with the views of this court in Barbara Hernster, 146 Fed. 732;" but we read in that case that an accounting was demanded and refused. In The Cape Horn Pigeon, 49 Fed. 164, the action was brought to procure a revision by the court of settlements made or offered to the men. The court found the settlements were just and did not disturb them. These cases are authority in support of our Exception No. VIII, and we know of no case where an accounting has been had over objection, except where it appeared that accounting had previously been tendered, made, or refused.

We inquire whether the court has noted the anomalous situation in this case, entirely different from any reported case. Here the libellants have the proceeds and have made no accounting, nor do they offer any. If, as was said in The Fairplay, there must be a settling of accounts before there is any right of action, then, certainly, the libellants must tender an accounting, for they have not only the money, but the only means of accounting, as the claimant was not in possession or control of the vessel, nor was he a party to their contract. Judge McCormick properly found, we think, that the libellants had no standing in a court of admiralty upon the confused and anomalous allegations of their pleading.

The Exceptions Not Mentioned in the Opinion Were Well Taken.

Exception II points out that it is not possible to tell whether Mascola claims one-sixth of the gross or net proceeds. The other libellants claim a proportion of "net proceeds."

Exception IV goes to the uncertainty whether the libellants rely upon a written contract. Be it noted that this contract was made among the libellants and that the claimant is not a party to it. Only a portion of the contract is alleged and it does not even appear whether libellants had separate contracts or one, or whether it was oral or written. They have no statutory rights under an oral contract, and no lien unless their oral contract expressly calls for it. Ianthe 12, Fed. Cas. 6982. As no contract for a lien is alleged, none is to be presumed, and as there is no pretense of privity to support an action *in personam,* the libel states no cause of action.

Exception V points out that the libel does not assert, as misstated in Your Honors' decision, that the contract was made by Mascola "as Master," or that it was made on behalf of the ship. The pleading is to be taken most strongly against the pleader, and if so construed does not even claim any lien. If liberally construed, it is subject to two interpretations and, therefore, is vague and uncertain, and the exception should have been sustained in either case. Scott v. Vailes, 31 Fed. Cas. 12530.

Exception VI points out that this contract, to which claimant was not a party, is not disclosed by the pleadings, so that he is unable to meet the question of how net proceeds were to be determined. Libellants do not mention this exception in their brief, nor were they able to meet it in argument. We assume that the court has noted that the libel alleges one-sixth was payable to the Master and five-sixths to the crew, leaving the query as to any reward to the owner. We have thus six men alleging that one of their number has the proceeds of a voyage, and that, therefore, the vessel should be sold to satisfy claims arising under a contract between themselves not disclosed in the pleadings. Can it be possible that exceptions to such a pleading "call for no special consideration"?

Exception VII goes to the vagueness and insufficiency of the sham allegation upon information and belief that the Master, who is one of the libellants, received $2,000.00 and that the net amount is $1,500.00. Certainly nobody knows better than the Master these facts, and this form of allegation is clearly a sham or careless pleading. Upon the argument of this exception, counsel

stated that he did not mean to say that any money had been received and this may be one reason why the trial court gave leave to amend. Here, again, we call attention to the admission in appellant's brief (page 11) that the amended libel is "somewhat uncertain."

The opinion at bar (p. 2) says: "Thereafter Sagliuzzo, as such Master, employed the other libellants." The libel, however, says "Thereafter—Mascola—Master of the said I. S. E. 2, employed the libellants." The opinion is, therefore, misleading in two particulars. Mascola did not appeal, but alleges he was paid in full, and there is no allegation that Mascola, "as Master" made the contract. He alleges upon information and belief that the amount paid him was $2,000.00. This is itself enough to support the Exception No. VII, as no person having knowledge of facts can be heard to allege them upon information and belief. 31 Cyc. 108. Presumably no one knows better than Mascola how much he received or what deductions he has made from gross proceeds. How can it be said that such amounts can be left to inference upon the libel of the one who was paid and now holds the money. Moreover, there is nothing to show that the libellants have not been paid, for the allegation that none of the libellants have been paid is repugnant to the express allegation that the money was paid to Mascola, one of the libellants. Six men come to the bar and allege that one of them has their money and that, therefore, none of them has been paid. Can it be said the trial court erred in sustaining exception to such a libel?

Exceptions VIII and IX are the only ones to which Your Honors gave attention, and we have already set forth our views.

Exception X points out that there is no liability *in rem* because there is no amount certain (The Fairplay); and further, the right of lien depends upon U. S. R. S. 4393, or an express contract for a lien, and does not otherwise exist. Ianthe 12 Fed. Cas. 6992.

Exception XI points out that there is no liability in *personam,* as Frymier is not alleged to be a party to the contract, nor in possession or control. Giles v. Vigoreux, 58 Am. Dec. 704.

Exceptions XII and XIII raise the objection that Mascola admits that he has been paid and, furthermore, he can not proceed *in rem.* The A. M. Vanderkoop, 24 Fed. 472; The Grace Darling, 10 Fed. Cas. 5651.

Exception XV points out that there is but one verification to six claims. We cite The Oregon, 133 Fed. 609, one of Your Honors' decisions. In this case there was one verification for a large number of claimants, and this was made by permission of the trial court upon a showing of the absence of claimants from the jurisdiction. Judge Gilbert said "We do not think this practice should be encouraged," but that there was no error where it was shown that the verification in this form had been permitted by court order upon a showing of absence. How can Your Honors now say that Judge McCormick was at fault in following this ruling?

Wherefore, petitioner respectfully prays that a rehearing may be granted, that the judgment of the District Court be affirmed, and that the mandate of this court may be stayed.

Respectfully submitted,

J. E. Frymier, *Claimant,*

By his Proctor, Wilbur Bassett.

I, Wilbur Bassett, of Los Angeles, California, a proctor regularly admitted to practice in the United States Circuit Court of Appeals for the Ninth Circuit, certify that in my opinion the foregoing Petition for Rehearing in the case of the Gasoline Launch "I. S. E. #2," No. 4949, is well founded, and do certify that it is not presented for the purpose of creating delay.

Dated November 20, 1926.

WILBUR BASSETT.